



4510-29-P

**DEPARTMENT OF LABOR**

Employee Benefits Security Administration

Proposed Exemptions from Certain Prohibited Transaction  
Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor

**ACTION:** Notice of Proposed Exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). If granted, these proposed exemptions allow designated parties to engage in transactions that would otherwise be prohibited provided the conditions stated there in are met. This notice includes the following proposed exemptions: **D-11890, Liberty Media 401(k) Savings Plan; D-11931, CLS Investments, LLC and Affiliates.**

**DATES:** All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of

Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice.

**ADDRESSES:** Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent via mail to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue, N.W., Suite 400, Washington, D.C. 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption or via private delivery service or courier to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, 122 C St. N.W., Suite 400, Washington, D.C. 20001. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX.

Any such comments or requests should be sent either by e-mail to: [e-OED@dol.gov](mailto:e-OED@dol.gov), by FAX to (202) 693-8474, or online through <http://www.regulations.gov> by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**WARNING:** All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

**SUPPLEMENTARY INFORMATION:**

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department, unless otherwise stated in the Notice of Proposed Exemption, within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of

the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).<sup>1</sup> Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

---

<sup>1</sup> The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

**Liberty Media 401(k) Savings Plan (the Plan)**

**Located in Englewood, CO**

**[Application No. D-11890]**

**PROPOSED EXEMPTION**

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).<sup>2</sup> If the proposed exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act shall not apply, for the period beginning May 24, 2016, and ending June 16, 2016, to:

(1) The acquisition by the Plan of certain stock subscription rights (the Rights) to purchase shares of Series C Liberty Braves common stock (the Series C Liberty Braves Stock), in connection with a rights offering (the Rights Offering) held by Liberty Media Corporation (LMC),

---

<sup>2</sup> For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

the Plan sponsor and a party in interest with respect to the Plan; and

(2) The holding of the Rights by the Plan during the subscription period of the Rights Offering, provided that certain conditions are satisfied.

### Summary of Facts and Representations<sup>3</sup>

#### Background

1. LMC (or the Applicant) is a Delaware corporation with its principal place of business in Englewood, Colorado.

LMC is a publicly-traded corporation primarily engaged in media, communications and entertainment operating businesses in North America, through several subsidiaries that include: Sirius XM Holdings Inc. (Sirius XM), Braves Holdings, LLC (Braves Holdings), and Live Nation Entertainment, Inc. (Live Nation), an equity affiliate.

2. LMC sponsors and maintains the Plan, a defined contribution plan which enables participating employees of LMC and its qualifying subsidiaries to direct the investment

---

<sup>3</sup> The Summary of Facts and Representations is based on LMC's representations and does not reflect the views of the Department, unless indicated otherwise.

of their Plan accounts across 22 investment alternatives, including certain employer securities issued by LMC, as well as employer securities issued by other participating employers in the Plan.

Plan assets are held in the Liberty Media 401(k) Savings Plan Trust (the Trust).

LMC adopted and maintains the Plan and Trust for the exclusive benefit of employee-participants and their beneficiaries. As designed, the Plan is intended to qualify under sections 401(a) and 401(k) of the Code, and the Trust is intended to be exempt under section 501(a) of the Code. As of December 31, 2016, the Plan had total assets of \$100,814,000 and 784 participants.

Fidelity Management Trust Company (Fidelity) is the trustee of the Plan, and acts as the custodian of the Plan assets, holding legal title to the Plan's assets, and executing investment directions in accordance with the written instructions of participants. The Liberty Media 401(k) Savings Plan Administrative Committee (the Committee) serves as the Plan Administrator and is the fiduciary responsible for Plan matters. The Committee, which was appointed by LMC's Board of Directors, has investment discretion over the Plan's investments, except to the extent

participants direct the investment of their Plan accounts.

Solely with respect to the Rights described below, the Committee acted as trustee of a temporary separate trust (the Rights Trust) established to hold the Rights, and Fidelity acted as custodian of those Rights. As of May 16, 2016, The Plan held a total of \$1,550,227.31 in Series C Liberty Braves Common Stock, which represented 0.595% of total Plan assets.

#### The Tracking Stock Proposal

3. On April 11, 2016, LMC shareholders met and approved a tracking stock proposal (the Tracking Stock Proposal), which resulted in the amendment and restatement of LMC's certificate of incorporation to exchange existing shares of LMC's common stock (LMC Stock) for newly-issued shares of three new tracking stocks (collectively, the Tracking Stocks), to be designated as: "Liberty SiriusXM common stock" (Liberty SiriusXM Stock); "Liberty Braves common stock" (Liberty Braves Stock); and "Liberty Media common stock" (Liberty Media Stock). The Tracking Stock structure was designed to provide LMC with greater operational and financial flexibility in the execution of its business strategies by permitting LMC to bring greater



flexibility to its business and assets, thereby allowing the stock related to each group to move in line with the fundamentals of the businesses and assets attributed to that group. Therefore, the Tracking Stock Proposal allowed the businesses, assets, and liabilities of LMC to be divided among a new SiriusXM Group, a new Braves Group, and a new Media Group.

The Applicant represents that Plan participants were sent a proxy statement (identical to the proxy statement sent to all shareholders of LMC stock) prior to that meeting, so that they could direct how the shares allocated to their accounts would be voted at that meeting.

#### Description of the Tracking Stocks

4. Liberty SiriusXM Stock is a newly-authorized and issued series of LMC Stock intended to track and reflect the separate economic performance of the businesses, assets, and liabilities to be attributed to the SiriusXM Group, which would initially include: (a) LMC's approximate 60% interest in Sirius XM Holdings, Inc.; (b) a \$250 million margin loan obligation incurred by a wholly-owned special purpose subsidiary of LMC, which is secured primarily by shares of Sirius XM Stock; (c) certain deferred tax liabilities; and

(d) \$50 million in cash. LMC is authorized to issue up to 4.075 billion shares of Liberty SiriusXM Stock, of which 2 billion are designated as Series A Liberty SiriusXM Stock, 75 million shares are designated as Series B Liberty SiriusXM Stock, and 2 billion shares are designated as Series C Liberty SiriusXM Stock.

5. Liberty Braves Stock is a newly-authorized and issued series of LMC Stock intended to track and reflect the separate economic performance of the businesses, assets, and liabilities to be attributed to the Braves Group, which would initially include: (a) LMC's wholly-owned subsidiary, Braves Holdings, LLC, which indirectly owns the Atlanta Braves Major League Baseball Club; (b) certain assets and liabilities associated with the Atlanta Braves' stadium and mixed use development project; (c) all liabilities arising under a note from Braves Holdings, LLC (Braves Holdings) to LMC, with total capacity of up to \$165 million of borrowings by Braves Holdings (the Intergroup Note); and (d) \$61 million in cash. LMC is authorized to issue up to 407.5 million shares of Liberty Braves Stock, of which 200 million shares are designated as Series A Liberty Braves Stock, 7.5 million shares are designated as Series B Liberty Braves Stock, and 200 million shares are designated as Series C

Liberty Braves Stock.

6. Liberty Media Stock is a newly-authorized and issued series of LMC Stock intended to track and reflect the separate economic performance of the businesses, assets, and liabilities to be attributed to the Media Group, which would consist of the remainder of LMC's businesses, assets and liabilities, including: (a) LMC's approximate 27% interest in Live Nation; (b) LMC's other public company minority investments; (c) all receivables under the Intergroup Note; (d) an approximately 20% inter-group interest in the Braves Group; (e) LMC's interest in any recovery received in connection with a 2013 judgment against Vivendi Universal S.A.; (f) \$50 million in cash; (g) LMC's interest in certain 1.375% cash convertible senior notes, in the principal amount of \$1 billion that are due in 2023, as well as bond and hedge warrant transactions that were executed concurrently with the issuance of such notes; and (h) 1,018,750,000 shares of LMC Stock.

7. Following the April 11, 2016 shareholder approval of the Tracking Stock Proposal, each holder of Series A, B, and C LMC Stock participated in a reclassification and exchange (the Reclassification and Exchange), under which each holder received the following upon the cancellation of

their existing shares of LMC Stock: (a) one newly-issued share of the corresponding series of Liberty SiriusXM Stock; (b) 0.1 of a newly-issued share of the corresponding series of Liberty Braves Stock; and (c) 0.25 of a newly-issued share of the corresponding shares of LMC Stock. LMC shareholders also received cash instead of receiving fractional shares for their interests in LMC Stock.

#### The Rights Offering

8. Pursuant to the Reclassification and Exchange described above, LMC also conducted a Rights Offering in order to raise capital to repay the Intergroup Note referenced above, and for general corporate purposes. Under the Rights Offering, each holder of Series A, B, or C Liberty Braves Stock, held as of May 16, 2016 (the Record Date), received 0.47 of a subscription right, entitling the holders to purchase one share of Series C Liberty Braves Stock at a subscription price of \$12.80 per share. The subscription price represented a 20% discount to the 20-trading day volume weighted average trading price of Series C Liberty Braves Stock, beginning on April 28, 2016, and ending on May 11, 2016. The Series C Liberty Braves Stock is traded on the NASDAQ Global Select Market (the NASDAQ),

under the symbol "BATRK."

9. The Rights Offering commenced on May 18, 2016 and remained open until June 16, 2016. The Plan received the Rights on or about May 24, 2016. The Applicant states that the Plan's delayed receipt of the Rights was attributable to certain administrative functions performed by Fidelity; Computershare Trust Company, N.A. (ComputerShare), the subscription agent with respect to the Rights Offering, and Depository Trust Company.

10. With respect to the Rights allocated to their Plan accounts (including Rights attributable to 401(k) contributions and employer matching contributions), Plan participants could either elect to exercise their Rights or sell the Rights on the open market. To assist with this decision, the Plan prepared and provided to participants a detailed explanation of their alternatives with respect to the Rights Offering, including: (a) questions and answers that explained the Rights issuance and the participants' option to exercise or sell their Rights; (b) instructions, which explained the steps for the participants to take to exercise or sell their Rights; and (c) a copy of LMC's prospectus filed with the Securities and Exchange Commission.

In order to sell the Rights, a Plan participant was required to contact a Fidelity representative and specify the whole percentage of the Rights such participant desired to sell between May 26, 2016 and June 7, 2016. Those participants who initially elected to exercise only a portion of their Rights could later elect to exercise additional Rights to the extent sufficient time existed prior to June 7, 2016. The Applicant represents that the June 7<sup>th</sup> participant notification deadline was necessary to ensure that Fidelity could process and execute all participant directives with respect to the Rights by June 16, 2016.

The Plan Administrative Committee determined that the oversubscription option, which entitled holders of LMC stock to subscribe to purchase shares in excess of the shares reflected by the Rights, would not be made available to Plan participants. The Applicant represents that, to exercise their oversubscription rights, participants had to transmit cash from their Plan accounts to LMC to be held, uninvested and not through a trust, until such time as the shares available for the oversubscription elections could be determined. The Applicant represents that, under this scenario, the Plan sponsor held Plan assets outside of the

Plan's trust: a scenario which involved a different set of prohibited transactions and fiduciary issues that the Plan Administrative Committee determined were not feasible to address.

11. Due to securities law restrictions, certain participants deemed to be "reporting persons" under Rule 16(b)<sup>4</sup> of the Securities Exchange Act of 1934 (Rule 16(b)) with respect to LMC did not have the right to instruct Fidelity to either sell or exercise the Rights credited to their Plan Accounts. As provided by the Plan, and as directed by the Committee, Fidelity sold the Rights credited to these 16(b) participant accounts as soon as administratively feasible, after the receipt and allocation of the Rights to the affected Plan participant accounts.

#### Temporary Investment Funds

12. The Plan established two temporary investment funds to hold the Rights. The first fund, the "Braves Rights Holding Fund," was a separate fund established under

---

<sup>4</sup> Rule 16(b) requires an officer, director, or any shareholder holding more than 10% of the outstanding shares of a publicly-traded company who makes a profit on a transaction with respect to the company's stock during a given six month period, to pay the difference back to the company.

the Rights Trust to hold the Rights upon issuance. Rights were credited to Plan participants accounts based on their respective holdings of Liberty Braves Stock as of the Record Date. The second fund, the "Braves Rights Holding Account Fund," reflected the approximate value of the Series C Liberty Braves Stock due from the subscription agent following the exercise of Rights on or before June 16, 2016, as directed by Plan participants.

13. With the exception of those reporting persons under Rule 16(b), as described above, each participant could elect to exercise any percentage of the Rights allocated to their account. Under the Rights Offering, each participant could elect to exercise the Rights by speaking to a Fidelity representative at any time prior to 4:00 pm Eastern Time, on June 7, 2016 (the Election Close-Out Date). Participants also had the opportunity to revoke or change instructions to exercise prior to the Election Close-Out Date by: (a) electing a new percentage of Rights to exercise, (b) placing an order to sell the Rights (as described below), or (c) a combination of both.

With respect to each participant, the dollar amount required to exercise the Rights was exchanged from other investments in such participant's account into the Braves



Rights Holding Account Fund. The dollar amount required to exercise the Rights equaled the percentage of Rights exercised (as elected by the participant) multiplied by the number of Rights credited to the participant's account and multiplied by the exercise price for the Rights Offering.

14. On or before June 16, 2016, the Rights to be exercised and necessary funds were submitted by Fidelity to ComputerShare, which is not affiliated with either LMC or Fidelity. Each Plan participant's balance in the Rights Holding Fund was reduced by the number of Rights exercised on such participant's behalf. Fidelity attempted to sell all remaining Rights on the open market between June 10, 2016 and June 16, 2016, at which time the Rights expired. Upon receipt of the new shares, the Braves Rights Holding Account Fund was closed and the newly-received shares were allocated to participants' Plan accounts.

The Applicant represents that the Election Close-Out Date was established to permit sufficient time for Fidelity to liquidate the participants' other assets in an orderly manner so that the necessary cash would be available to exercise the Rights before the June 16, 2016 Rights Offering expiration date. Unexercised Rights after June 7, 2016 were offered for sale on the open market by Fidelity, from on or

about June 10, 2016 through June 16, 2016. Rights that remained unsold at the close of the market on June 16, 2016 expired.

15. In connection with the Rights Offering, the Plan received a total of 15,821 Rights. Of the Rights received, 12,334 were sold by Fidelity,<sup>5</sup> 3,486 were exercised by participants,<sup>6</sup> and 1 Right expired. The Rights were sold at an average price of \$1.90 per Right, net of fees. The

---

<sup>5</sup> The Applicant represents that the brokerage services and fees received by Fidelity or by Computershare in connection with the sale of the Rights held by Plan participants, are exempt under section 408(b)(2) of the Act. The Department, herein, is not providing any relief for the receipt of any commissions, fees, or expenses in connection with the sale of the Rights in blind transactions to unrelated third parties on the NASDAQ, beyond that provided under section 408(b)(2) of the Act. In this regard, the Department is not opining herein on whether the conditions set forth in section 408(b)(2) of the Act and the Department's regulations, pursuant to 29 CFR 2550.408(b)(2) have been satisfied.

<sup>6</sup> The Applicant represents that the Plan accounts relied on the relief provided by the statutory exemption, pursuant to section 408(e) of the Act for the exercise of the Rights. The Department is not providing any relief herein from such prohibited transaction provisions with respect to the exercise of the Rights. In addition, the Department is offering no view on whether the requirements of the statutory exemption provided in section 408(e) of the Act and the Department's regulations, pursuant to 29 CFR 2550.408(e) were satisfied or whether the statutory exemption is applicable to the exercise of the Rights.

Applicant represents that Fidelity sold 1,921 Rights (rounded to the nearest whole Right) at the direction of participants, and 10,413 Rights (rounded to the nearest whole Right) after June 7, 2016.

### Analysis

16. LMC represents that the acquisition and holding of the Rights by the Plan constitute prohibited transactions in violation of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act. Section 406(a)(1)(E) of the Act provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he or she knows or should know that such transaction constitutes the acquisition, on behalf of the plan, of any employer security in violation of section 407(a) of the Act. Section 406(a)(2) of the Act provides that a fiduciary of a plan shall not permit the plan to hold any employer security if he or she knows or should know that holding such security violates section 407(a) of the Act. Under section 407(a)(1)(A) of the Act, a plan may not acquire or hold any "employer security" which is not a "qualifying employer security." Under section 407(d)(1) of the Act, "employer securities" are defined, in relevant part, as securities

issued by an employer of employees covered by the plan, or by an affiliate of such employer. Section 407(d)(5) of the Act provides, in relevant part, that "qualifying employer securities" are stock or marketable obligations.

The Applicant states that the Plan was a holder of Series C Liberty Braves Stock on the date of the Rights Offering. As such, the grant of the Rights to the Plan was a grant of "employer securities" under section 407(d)(1) of the Act. Because the Rights do not constitute either stock or marketable obligations, the Rights are not "qualifying employer securities." Therefore, the Applicant requests a retroactive exemption from sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act with respect to the acquisition and holding of the Rights by the Plan in connection with the Rights Offering. If granted, the exemption will be effective for the period May 24, 2016, through June 16, 2016.

#### Statutory Findings

17. The Applicant represents that the proposed exemption is administratively feasible because it involved the acquisition and short-term holding of the Rights by the individual accounts of Plan participants. The Applicant

also represents that all shareholders, including the Plan participants, were treated in a like manner with respect to the acquisition and holding of the Rights, with two exceptions: (a) the oversubscription option available under the Rights Offering was not available to participants in the Plan; and (b) certain participants deemed to be reporting persons under Rule 16(b) with respect to LMC did not have the right to instruct Fidelity to sell or exercise the Rights credited to their Plan Accounts.

The Applicant represents that Plan participants would suffer a hardship were the exemption to be denied because the issuance of the Rights to the Plan was not within the control of the Plan or the Plan's fiduciaries, as LMC issued subscription rights to all holders of Liberty Braves Stock, including the Plan. If the exemption were denied, the Applicant states that the transactions would have to be undone and those participants who elected to use their Plan accounts to purchase shares of Series C Liberty Braves Stock at a discount would be required to return those shares for the price they paid. This, according to the Applicant, would result in those participants losing earnings attributable to those shares.

18. The Applicant represents that the proposed

exemption is also in the interests of the Plan and its participants and beneficiaries because: (a) Plan participants were notified of the Rights Offering and the procedure for instructing Fidelity regarding their desire with respect to the exercise or sale of the Rights; (b) all shareholders of Liberty Braves Stock, including the Plan, were treated in a like manner, with two exceptions, which are noted above in paragraph 17; (c) the Plan was treated in the same manner as other shareholders with respect to the granting and the exercise or sale of the Rights; and (d) the pass-through of the decision to exercise or sell the Rights, from Fidelity to the Plan participants allowed each participant to decide whether to liquidate his or her account to purchase additional shares of employer securities at a discount.

19. Finally, the Applicant represents that the proposed exemption is protective of the rights of participants because the Rights were sold by Fidelity, at the direction of the affected Plan participants, on the NASDAQ for their fair market value, in arms'-length transactions between unrelated parties. Furthermore, the Applicant represents that the Plan did not pay any fees or commissions with respect to the acquisition or holding of

the Rights, and it did not pay any commissions to any affiliate of LMC in connection therewith.

Summary

20. Given the conditions described below, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of the Act.

PROPOSED EXEMPTION OPERATIVE LANGUAGE

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B (76 FR 46637, 66644, October 27, 2011). If the exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act shall not apply, for the period May 24, 2016, through June 16, 2016, to: (1) the acquisition by the Plan of the Rights in connection with the Rights Offering; and (2) the holding of the Rights by the Plan during the subscription period of the Rights Offering, provided that the following conditions are satisfied:

(a) The Plan's acquisition of the Rights resulted

solely from an independent corporate act of LMC;

(b) All holders of Series A, Series B, or Series C Liberty Braves common stock (Series A, B, or C Liberty Braves Stock), including the Plan, were issued the same proportionate number of Rights based on the number of shares of the Series A, B, or C Liberty Braves Stock held by each such shareholder;

(c) For purposes of the Rights Offering, all holders of Series A, B, or C Liberty Braves Stock, including the Plan, were treated in a like manner, with two exceptions: (1) the oversubscription option available under the Rights Offering was not available to participants in the Plan; and (2) certain participants deemed to be reporting persons under Rule 16(b) with respect to LMC did not have the right to instruct Fidelity to either sell or exercise the Rights credited to their Plan Accounts;

(d) The acquisition of the Rights by the Plan was made in a manner that was consistent with provisions of the Plan for the individually-directed investment of participant accounts;

(e) The Committee directed the Plan trustee to sell the Rights on the NASDAQ Global Select Market (the NASDAQ), in accordance with Plan provisions that precluded the Plan from



acquiring additional shares of Series C Liberty Braves Stock;

(f) The Committee did not exercise any discretion with respect to the acquisition and holding of the Rights; and

(g) The Plan did not pay any fees or commissions in connection with the acquisition or holding of the Rights, and it did not pay any commissions to any affiliates of LMC in connection with the sale of the Rights.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective from May 24, 2016, the date that the Plan received the Rights, through June 16, 2016, the last date the Rights were sold on the NASDAQ.

#### NOTICE TO INTERESTED PERSONS

Notice of the proposed exemption will be given to all Interested Persons within 7 days of the publication of the notice of proposed exemption in the Federal Register, by first class U.S. mail to the last known address of all such individuals. Such notice will contain a copy of the notice of proposed exemption, as published in the Federal Register, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform

interested persons of their right to comment on the pending exemption. Written comments are due within 37 days of the publication of the notice of proposed exemption in the Federal Register. All comments will be made available to the public.

**WARNING:** If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Joseph Brennan of the Department, telephone (202) 693-8456. (This is not a toll-free number.)

**CLS Investments, LLC and Affiliates**

**(CLS or the Applicant)**

**Located in Omaha, NE**

**[Application No. D-11931]**

PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 46637, 66644, October 27, 2011). If the exemption is granted, the restrictions of sections 406(a)(1)(D) and 406(b) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(D) through (F) of the Code,<sup>7</sup> shall not apply to the receipt of a fee by CLS from a registered, open-end investment company for which CLS serves as an investment advisor (an Affiliated Fund), in connection with

---

<sup>7</sup> For purposes of this proposed exemption reference to specific provisions of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of the Code.

the investment by an employee benefit plan in shares of such Affiliated Fund, where CLS serves as an investment advisor or investment manager with respect to such plan (Client Plan), provided the conditions of this exemption are met.

#### SUMMARY OF FACTS AND REPRESENTATIONS<sup>8</sup>

1. CLS is an investment adviser registered with the U.S. Securities and Exchange Commission. CLS offers a variety of financial services and operates primarily as an Exchange Traded Funds strategist working with more than 2,500 financial advisors and 1,300 qualified plan sponsors to manage more than 35,000 investor portfolios. CLS also acts as a sub-advisor and investment research provider to many broker-dealer self-clearing platforms, brokerage custodians, Registered Investment Advisors (RIAs), and overlay portfolio management enterprises.

2. CLS acts an investment adviser to the Affiliated Funds. The Affiliated Funds are diversified open-end investment companies registered with the U.S. Securities and Exchange Commission under the Investment Company Act, as amended. CLS may also provide certain "secondary services"

---

<sup>8</sup> The Summary of Facts and Representations is based on the Applicant's representations, unless indicated otherwise.

to the Affiliated Funds, including custodial, accounting, administrative services and brokerage services (hereinafter, Secondary Services).

3. The Applicant seeks an exemption that would permit the receipt of a fee by CLS from an Affiliated Fund, in connection with the investment by a Client Plan in shares of such Affiliated Fund, where CLS serves as an investment advisor or investment manager with respect to such Client Plan. Absent an exemption, such investment may violate several provisions of the Act. In this regard, CLS, as investment manager or investment adviser to the Client Plans, is a fiduciary with respect to the Client Plans, pursuant to section 3(21)(A)(i) and (ii) of the Act. Section 3(21)(A) of the Act provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent that the person: (i) exercises any discretionary authority or control respecting management of the Plan or any authority or control respecting management or disposition of its assets, or (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of a plan or has any authority or responsibility to do so.

4. Section 406(a)(1)(D) of the Act prohibits a fiduciary with respect to a plan from causing such plan to engage in a transaction, if such fiduciary knows or should know, that such transaction constitutes a transfer to, or use by or for the benefit of, a party in interest, of any assets of such plan. Section 406(b) of the Act provides that a fiduciary with respect to a plan may not: (1) deal with the assets of a plan in his own interest or for his own account; (2) act, in his individual or in any other capacity, in any transaction involving a plan on behalf of a party (or represent a party) whose interests are adverse to the interests of such plan or the interests of its participants or beneficiaries; or (3) receive any consideration for his own personal account from any party dealing with a plan in connection with a transaction involving the assets of such plan.

5. An arrangement whereby CLS, as investment adviser or manager to a Client Plan, invests plan assets in shares of a mutual fund that is advised by CLS and receives an advisory or Secondary Services fee from the Affiliated Fund in connection therewith, may be viewed as an impermissible use of Client Plan assets, in violation of section 406(a)(1)(D) of the Act. In connection with such

investment, the increased compensation of CLS could be viewed as a violation of section 406(b)(1) and (b)(2) of the Act. Further, the receipt by CLS of compensation from an Affiliated Fund could also be viewed as a violation of section 406(b)(3) of the Act.

6. PTE 77-4 provides an exemption from section 406 of the Act and section 4975 of the Code for the purchase and for the sale by a plan of shares of a registered, open-end investment company, where the investment adviser of such fund: (a) is a plan fiduciary or affiliated with a plan fiduciary; and (b) is not an employer of employees covered by the plan. Prior to implementing any fee increase, an investment adviser relying on PTE 77-4 must provide prior disclosures to each affected second fiduciary, and must obtain written authorization from each such second fiduciary. PTE 77-4 prohibits the payment by a plan of commissions, 12b-1 fees, redemption fees, and similar fees, as well as the payment of double investment advisory fees and similar fees with respect to plan assets invested in such shares for the entire period of such investment.

7. CLS states that obtaining advance written consent from each Second Fiduciary (which refers, in general terms,

to a Client Plan fiduciary who is independent of and unrelated to CLS) prior to any Fee Increase can be extremely difficult due to both the large number of Client Plans involved and the difficulty in obtaining responses from individual IRA owners. According to CLS, absent the requested exemptive relief, CLS's failure to receive affirmative written approval on an individual Client Plan basis could require CLS to transfer Client Plan investments out of one or more Funds, where such Client Plans may not desire such an outcome.

8. CLS seeks relief that is essentially the same as that afforded by PTE 77-4, with the exception of the use of a "negative consent" procedure, which would constitute a Client Plan's approval of a Fee Increase.<sup>9</sup> For purposes of the exemption, a Fee Increase is: (a) any change by CLS in a rate of fee; (b) any increase in any fee that results from the addition of a service for which a fee is charged; (c) any increase in fee that results from a decrease in the

---

<sup>9</sup> The Applicant represents that all of the CLS-affiliated entities to which the exemption would apply are currently part of the same controlled group. CLS represents that, if and to the extent that CLS invests Client Plan assets in Affiliated Funds, such CLS-affiliated entities can rely on the relief provided pursuant to PTE 77-4 (42 FR 18732 (April 8, 1977)), except as described below.



number of services; (d) any increase in any fee that results from a decrease in the kind of services provided by CLS for such fee over an existing rate of fee for each such service previously authorized by a Second Fiduciary; (e) any change in fee that results from CLS changing from one fee method to another; and (f) any change in the amount of operating expenses of a Fund reimbursed or otherwise waived by CLS or its affiliates to the extent that such change results in an increase in the total operating expenses payable by the Fund.

9. The exemption contains several conditions that are consistent with the conditions found in PTE 77-4. For example, the exemption requires, among other things, that each Client Plan which is invested in shares of an Affiliated Fund, either: does not pay to CLS, for the entire period of such investment, any investment management fee, or any investment advisory fee, or any similar fee at the plan-level, with respect to any of the assets of such Client Plan which are invested in shares of such Affiliated Fund; or pays to CLS a Plan-Level Management Fee, based on total assets of such Client Plan under management by CLS at the plan-level, from which a credit has been subtracted from such Plan-Level Management Fee. Further, no sales

commission or no other similar fee may be paid in connection with any purchase and in connection with any sale by a Client Plan in shares of an Affiliated Fund. The payment of a redemption fee is permitted only if: such redemption fee is paid only to an Affiliated Fund; and the existence of such redemption fee is disclosed in the summary prospectus for such Affiliated Fund in effect both at the time of any purchase of shares in such Affiliated Fund and at the time of any sale of such shares.

10. Additionally, in general terms, the combined total of all fees received by CLS may not be in excess of reasonable compensation within the meaning of section 408(b)(2) of the Act. CLS may not receive any fees payable pursuant to Rule 12b-1 under the Investment Company Act in connection with transactions covered by the exemption. Further, no Client Plan may be an employee benefit plan sponsored or maintained by CLS.

11. This exemption contains extensive notification requirements. The Second Fiduciary must receive, in writing, in advance of any investment by such Client Plan in shares of such Affiliated Fund, a full and detailed disclosure of information concerning such Affiliated Fund, including: a current summary prospectus issued by each such Affiliated

Fund; a statement describing the fees; and the reasons why CLS may consider investment in shares of such Affiliated Fund by such Client Plan to be appropriate for such Client Plan.

12. The Second Fiduciary must authorize, in writing, among other things: the investment of the assets of such Client Plan in shares of an Affiliated Fund; the Affiliated Fund-Level Advisory Fee received by CLS for investment advisory services and similar services provided by CLS to such Affiliated Fund; and the fee received by CLS for Secondary Services provided by CLS to such Affiliated Fund.

Any such authorization made by a Second Fiduciary is terminable at will by such Second Fiduciary, without penalty to such Client Plan (including any fee or charge related to such penalty). The process for termination includes the Second Fiduciary's receipt, at least annually, of a form (the Termination Form), which expressly provides for an election to terminate an authorization. Notwithstanding this, the instructions for the Termination Form must also inform the Second Fiduciary that, among other things, as of the date that is at least thirty (30) days from the date that CLS sent the Termination Form to such Second Fiduciary, the failure by such Second Fiduciary to return such

Termination Form or the failure by such Second Fiduciary to provide some other written notification of the Client Plan's intent to terminate an authorization that is subject to a negative consent arrangement covered by this exemption, will be deemed to be an approval by such Second Fiduciary.

13. The exemption also requires that CLS, at least thirty (30) days in advance of the implementation of a fee increase, provide to the Second Fiduciary of each Client Plan, a notice of change in fees (the Notice of Change in Fees) which explains the nature and the amount of such Fee Increase. Such Notice of Change in Fees must be accompanied by a Termination Form and by instructions on the use of such Termination Form. The notice must explain that, as of the date that is at least thirty (30) days from the date that CLS sends the Notice of Change of Fees and the Termination Form to such Second Fiduciary, the failure by such Second to return such Termination Form or the failure by such Second Fiduciary to provide some other written notification of the Client Plan's intent to terminate the authorization, will be deemed to be an approval by such Second Fiduciary of such Fee Increase.

14. The exemption contains other safeguards designed to protect affected Client Plans. In this regard, in

general terms: CLS must provide reasonably available information regarding the covered transactions that the Second Fiduciary of such Client Plan requests; all dealings between a Client Plan and an Affiliated Fund are on a basis no less favorable to such Client Plan, than dealings between such Affiliated Fund and other similar shareholders; in the event a Client Plan invests in shares of an Affiliated Fund, if such Affiliated Fund places brokerage transactions with CLS, CLS must provide to the Second Fiduciary of each such Client Plan, so invested, an annual statement specifying relevant commission information; the purchase price paid and the sales price received by a Client Plan for shares in an Affiliated Fund purchased or sold directly must be the net asset value per share, and must be the same purchase price that would have been paid, and the same sales price that would have been received, for such shares by any other shareholder of the same class of shares in such Affiliated Fund at that time; and CLS, including any officer and any director of CLS, may not purchase any shares of an Affiliated Fund from, and may not sell any shares of an Affiliated Fund to, any Client Plan which invests directly in such Affiliated Fund. The exemption also contains recordkeeping requirements.

15. Importantly, the conditions of PTE 77-4, as amended and/or restated, must be met. Further, if CLS is a fiduciary within the meaning of section 3(21)(A)(i) or (ii) of the Act, or section 4975(e)(3)(A) or (B) of the Code, with respect to the assets of a Client Plan involved in the transaction, CLS must comply with the following conditions with respect to the transaction: (1) CLS must act in the Best Interest (as described below) of the Client Plan; (2) all compensation received by CLS in connection with the transaction in relation to the total services the fiduciary provides to the Client Plan must not exceed reasonable compensation within the meaning of section 408(b)(2) of the Act; and (3) CLS's statements about recommended investments, fees, material conflicts of interest,<sup>10</sup> and any other matters relevant to a Client Plan's investment decisions must not be materially misleading at the time they are made. In the last regard, CLS acts in the "Best Interest" of the Client Plan when CLS acts with the care, skill, prudence,

---

<sup>10</sup> A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Client Plan. For this purpose, the failure of CLS to disclose a material conflict of interest relevant to the services it is providing to a Client Plan, or other actions it is taking in relation to a Client Plan's investment decisions, is deemed to be a misleading statement.

and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.

16. CLS represents that it will "actively" satisfy the various disclosure requirements of this proposed exemption by transmitting emails, rather than relying on "passive" postings on a Web site. CLS represents that Client Plans that do not authorize electronic delivery will receive, in advance, hard copies of the required documents, and that hard copies of required documents will be available to Client Plans upon request. CLS represents that the disclosure methods under this exemption will be consistent with the Department's regulations at 29 CFR 2520.104b-1.

17. The Applicant represents that the proposed exemption is in the interest of Client Plans because it will allow CLS to manage Client Plan assets more efficiently. The Applicant states that the Affiliated Funds provide certain advantages to Client Plans, including access to professional management services and lower costs,

including no sales commission costs in connection with the purchase or sale of shares in any of the Funds and no 12b-1 fees. The Applicant also represents that the Affiliated Funds provide a means for Client Plans with limited assets to achieve diversification of investment in a manner that may not be attainable through direct investment by a plan participant. For these reasons, CLS maintains that the availability of the Funds as investments enables CLS, as investment manager, to better meet the investment goals and strategies of a Client Plan.

18. The Applicant represents that the proposed exemption is protective of Client Plans because it contains sufficient safeguards for the protection of the Client Plans invested in the Funds. In this regard, prior to any investment by a Client Plan in a Fund, the investment must be authorized in writing by the Second Fiduciary of such Client Plan, based on a full and detailed written disclosure concerning such Fund. The Applicant states that, in addition to the initial disclosures provided to the Second Fiduciary of a Client Plan invested in a Fund, CLS provides such Second Fiduciary with ongoing disclosures regarding such Fund and the fee methods. Specifically, CLS provides the Second Fiduciary with the current Fund



prospectuses, the annual financial disclosure reports containing information about the Funds, and audit findings. The Applicant states that CLS will respond to inquiries from a Second Fiduciary and, upon request, will provide: copies of the Statements of Additional Information for the Funds, a copy of the proposed exemption, and a copy of the final exemption, if granted, once such documents are published in the Federal Register.

Further, the Applicant states that Client Plan investments in Affiliated Funds will be subject to the ongoing ability of the Second Fiduciary of such Client Plan to terminate the investment without penalty to such Client Plan, at any time, upon written notice of termination. In this regard, the Applicant states that the Second Fiduciary will have sufficient opportunity to terminate a Client Plan's investment in a Fund, without penalty to the Client Plan, and withdraw the Client Plan's investment from such Fund in advance of any such change in fee. Also in this regard, the Applicant states that any and all changes in fees payable to CLS by Affiliated Funds will be on terms monitored by the Second Fiduciary who will be prompted by the Termination Form with a means to avoid the effect of such changes.

Summary

19. Given the conditions applicable to the transactions covered by this exemption, if granted, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under section 408(a) of the Act.

PROPOSED EXEMPTION OPERATIVE LANGUAGE

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 46637, 66644, October 27, 2011).

SECTION I. Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(D) and 406(b) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(D) through (F) of the Code,<sup>11</sup> shall not apply to the receipt of a fee by CLS,

---

<sup>11</sup> For purposes of this proposed exemption reference to specific provisions of Title I of the Act, unless otherwise

from an open-end investment company (Affiliated Fund), in connection with the investment in shares of any such Affiliated Fund, by an employee benefit plan (a Client Plan), as defined in Section IV(b), where CLS serves as a fiduciary with respect to such Client Plan, and where CLS: (a) provides investment advisory services, or similar services to any such Affiliated Fund; and (b) provides to any such Affiliated Fund any other services (Secondary Services), as defined below in Section IV(i).

## SECTION II. Specific Conditions

(a) Each Client Plan which is invested in shares of an Affiliated Fund either:

(1) Does not pay to CLS, for the entire period of such investment, any investment management fee, or any investment advisory fee, or any similar fee at the plan-level (the Plan-Level Management Fee), as defined below in Section IV(1), with respect to any of the assets of such Client Plan which are invested in shares of such Affiliated Fund; or

---

specified, should be read to refer as well to the corresponding provisions of the Code.

(2) Pays to CLS a Plan-Level Management Fee, based on total assets of such Client Plan under management by CLS at the plan-level, from which a credit has been subtracted from such Plan-Level Management Fee, where the amount subtracted represents such Client Plan's pro rata share of any investment advisory fee and any similar fee (the Affiliated Fund Level Advisory Fee), as defined below in Section IV(m), paid by such Affiliated Fund to CLS.

If, during any fee period, in the case of a Client Plan invested in shares of an Affiliated Fund, such Client Plan has prepaid its Plan Level Management Fee, and such Client Plan purchases shares of an Affiliated Fund, the requirement of this Section II(a)(2) shall be deemed met with respect to such prepaid Plan-Level Management Fee, if, by a method reasonably designed to accomplish the same, the amount of the prepaid Plan-Level Management Fee that constitutes the fee with respect to the assets of such Client Plan invested in shares of an Affiliated Fund:

(i) Is anticipated and subtracted from the prepaid Plan-Level Management Fee at the time of the payment of such fee; or

(ii) Is returned to such Client Plan, no later than during the immediately following fee period; or

(iii) Is offset against the Plan-Level Management Fee for the immediately following fee period or for the fee period immediately following thereafter.

For purposes of Section II(a)(2), a Plan-Level Management Fee shall be deemed to be prepaid for any fee period, if the amount of such Plan-Level Management Fee is calculated as of a date not later than the first day of such period.

(b) No sales commissions, no redemption fees, and no other similar fees are paid in connection with any purchase and in connection with any sale by a Client Plan in shares of an Affiliated Fund. However, this Section II(b) does not prohibit the payment of a redemption fee, if:

(1) Such redemption fee is paid only to an Affiliated Fund; and

(2) The existence of such redemption fee is disclosed in the summary prospectus for such Affiliated Fund in effect both at the time of any purchase of shares in such Affiliated Fund and at the time of any sale of such shares.

(c) The combined total of all fees received by CLS is not in excess of reasonable compensation within the meaning of section 408(b)(2) of the Act, for services provided:

(1) By CLS to each Client Plan; and

(2) By CLS to each Affiliated Fund in which a Client Plan invests in shares of such Affiliated Fund;

(d) CLS does not receive any fees payable pursuant to Rule 12b-1 under the Investment Company Act in connection with the transactions covered by this proposed exemption;

(e) No Client Plan is an employee benefit plan sponsored or maintained by CLS;

(f) In the case of a Client Plan investing in shares of an Affiliated Fund, the Second Fiduciary, as defined below in Section IV(h), acting on behalf of such Client Plan, receives, in writing, in advance of any investment by such Client Plan in shares of such Affiliated Fund, a full and detailed disclosure via first class mail or via personal delivery of (or, if the Second Fiduciary consents to such means of delivery, through electronic e-mail, in accordance with Section II(n), as set forth below) information concerning such Affiliated Fund, including but not limited to the items listed below:

(1) A current summary prospectus issued by each such Affiliated Fund;

(2) A statement describing the fees, including the nature and extent of any differential between the rates of such fees for:

(i) Investment advisory and similar services to be paid to CLS by each Affiliated Fund;

(ii) Secondary Services to be paid to CLS by each such Affiliated Fund; and

(iii) All other fees to be charged by CLS to such Client Plan and to each such Affiliated Fund and all other fees to be paid to CLS by each such Client Plan and by each such Affiliated Fund;

(3) The reasons why CLS may consider investment in shares of such Affiliated Fund by such Client Plan to be appropriate for such Client Plan;

(4) A statement describing whether there are any limitations applicable to CLS with respect to which assets of such Client Plan may be invested in shares of such Affiliated Fund, and if so, the nature of such limitations; and

(5) Upon the request of the Second Fiduciary acting on behalf of such Client Plan, a copy of the Notice of Proposed Exemption (the Notice), a copy of the final exemption, if granted, and any other reasonably available information regarding the transactions which are the subject of this proposed exemption;

(g) On the basis of the information described above in Section II(f), a Second Fiduciary acting on behalf of a Client Plan authorizes, in writing:

(1) The investment of the assets of such Client Plan in shares of an Affiliated Fund;

(2) The Affiliated Fund-Level Advisory Fee received by CLS for investment advisory services and similar services provided by CLS to such Affiliated Fund;

(3) The fee received by CLS for Secondary Services provided by CLS to such Affiliated Fund;

(4) The Plan-Level Management Fee received by CLS for investment management and similar services provided by CLS to such Client Plan at the plan-level; and

(5) The selection, by CLS, of the applicable fee method, as described above in Section II(a)(1)-(2);

All authorizations made by a Second Fiduciary pursuant to this Section II(g) must be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act;

(h)(1) Any authorization, described above in Section II(g), and any authorization made pursuant to negative consent, as described below in Section II(i), made by a Second Fiduciary, acting on behalf of a Client Plan,



shall be terminable at will by such Second Fiduciary, without penalty to such Client Plan (including any fee or charge related to such penalty), upon receipt by CLS via first class mail, via personal delivery, or via electronic e-mail of a written notification of the intent of such Second Fiduciary to terminate any such authorization;

(2) A form (the Termination Form), expressly providing an election to terminate any authorization, described above in Section II(g), or to terminate any authorization made pursuant to negative consent, as described below in Section II(i), with instructions on the use of such Termination Form, must be provided to such Second Fiduciary at least annually, either in writing via first class mail or via personal delivery (or if such Second Fiduciary consents to such means of delivery, through electronic e-mail, in accordance with Section II(n), as set forth below). However, if a Termination Form has been provided to such Second Fiduciary pursuant to Section II(i), then a Termination Form need not be provided pursuant to this Section II(h), until at least six (6) months, but no more than twelve (12) months, have elapsed, since the prior Termination Form was provided;

(3) The instructions for the Termination Form must include the following statements:

(i) Any authorization, described above in Section II(g), and any authorization made pursuant to negative consent, as described below in Section II(i), is terminable at will by a Second Fiduciary, acting on behalf of a Client Plan, without penalty to such Client Plan, upon receipt by CLS, via first class mail or via personal delivery or via electronic e-mail, of the Termination Form, or some other written notification of the intent of such Second Fiduciary to terminate such authorization; and

(ii) As of the date that is at least thirty (30) days from the date that CLS sends the Termination Form to such Second Fiduciary, the failure by such Second Fiduciary to return such Termination Form or the failure by such Second Fiduciary to provide some other written notification of the Client Plan's intent to terminate any authorization, described in Section II(g), or intent to terminate any authorization made pursuant to negative consent, as described below in Section II(i), will be deemed to be an approval by such Second Fiduciary;

(4) In the event that a Second Fiduciary, acting on behalf of a Client Plan, at any time returns a Termination

Form or returns some other written notification of intent to terminate any authorization, as described above in Section II(g), or intent to terminate any authorization made pursuant to negative consent, as described below in Section II(i), the termination will be implemented by the withdrawal of all investments made by such Client Plan in the affected Affiliated Fund, and such withdrawal will be implemented by CLS within one (1) business day of the date that CLS receives such Termination Form or receives from the Second Fiduciary, acting on behalf of such Client Plan, some other written notification of intent to terminate any such authorization;

(5) From the date a Second Fiduciary, acting on behalf of a Client Plan that invests in shares of an Affiliated Fund, returns a Termination Form or returns some other written notification of intent to terminate such Client Plan's investment in such Affiliated Fund, such Client Plan will not be subject to pay a pro rata share of any Affiliated Fund-Level Advisory Fee and will not be subject to pay any fees for Secondary Services paid to CLS by such Affiliated Fund, or any other fees or charges;

(i)(1) CLS, at least thirty (30) days in advance of the implementation of each fee increase (Fee Increase(s)), as

defined below in Section IV(k), must provide in writing via first class mail or via personal delivery (or if the Second Fiduciary consents to such means of delivery through electronic e-mail, in accordance with Section II(n), as set forth below), a notice of change in fees (the Notice of Change in Fees) (which may take the form of a proxy statement, letter, or similar communication which is separate from the summary prospectus of such Affiliated Fund) and which explains the nature and the amount of such Fee Increase to the Second Fiduciary of each affected Client Plan. Such Notice of Change in Fees shall be accompanied by a Termination Form and by instructions on the use of such Termination Form, as described above in Section II(h); and

(2) As of the date that is at least thirty (30) days from the date that CLS sends the Notice of Change of Fees and the Termination Form to such Second Fiduciary, the failure by such Second to return such Termination Form and the failure by such Second Fiduciary to provide some other written notification of the Client Plan's intent to terminate the authorization, described in Section II(g), or to terminate the negative consent authorization, as described in Section II(i), will be deemed to be an approval by such Second Fiduciary of such Fee Increase.

(j) CLS is subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Second Fiduciary of such Client Plan requests CLS to provide.

(k) All dealings between a Client Plan and an Affiliated Fund are on a basis no less favorable to such Client Plan, than dealings between such Affiliated Fund and other shareholders of the same class of shares in such Affiliated Fund.

(l) In the event a Client Plan invests in shares of an Affiliated Fund, if such Affiliated Fund places brokerage transactions with CLS, CLS will provide to the Second Fiduciary of each such Client Plan, so invested, at least annually a statement specifying:

(1) The total, expressed in dollars, of brokerage commissions that are paid to CLS by each such Affiliated Fund;

(2) The total, expressed in dollars, of brokerage commissions that are paid by each such Affiliated Fund to brokerage firms unrelated to CLS;

(3) The average brokerage commissions per share, expressed as cents per share, paid to CLS by each such Affiliated Fund; and

(4) The average brokerage commissions per share, expressed as cents per share, paid by each such Affiliated Fund to brokerage firms unrelated to CLS;

(m) (1) CLS provides to the Second Fiduciary of each Client Plan invested in shares of an Affiliated Fund with the disclosures, as set forth below, and at the times set forth below in Section II(m) (1) (i)-(v), either in writing via first class mail or via personal delivery (or if the Second Fiduciary consents to such means of delivery, through electronic e-mail, in accordance with Section II(q) as set forth below):

(i) Annually, with a copy of the current summary prospectus for each Affiliated Fund in which such Client Plan invests in shares of such Affiliated Fund;

(ii) Upon the request of such Second Fiduciary, a copy of the statement of additional information for each Affiliated Fund in which such Client Plan invests in shares of such Affiliated Fund which contains a description of all fees paid by such Affiliated Fund to CLS;

(iii) Oral or written responses to the inquiries posed by the Second Fiduciary of such Client Plan, as such inquiries arise; and

(iv) Annually, with a Termination form, as described in Section II(h)(1), and instructions on the use of such form, as described in Section II(h)(3), except that if a Termination Form has been provided to such Second Fiduciary pursuant to Section II(i), then a Termination Form need not be provided again pursuant to this Section II(m)(1)(v) until at least six (6) months but no more than twelve (12) months have elapsed since a Termination Form was provided;

(n) Any disclosure required herein to be made by CLS to a Second Fiduciary may be delivered by electronic e-mail containing direct hyperlinks to the location of each such document required to be disclosed, which are maintained on a website by CLS, provided:

(1) CLS obtains from such Second Fiduciary prior consent in writing to the receipt by such Second Fiduciary of such disclosure via electronic e-mail;

(2) Such Second Fiduciary has provided to CLS a valid e-mail address; and

(3) The delivery of such electronic e-mail to such Second Fiduciary is provided by CLS in a manner consistent with the relevant provisions of the Department's regulations at 29 CFR section 2520.104b-1(c) (substituting the word "CLS" for the word "administrator" as set forth therein, and substituting the phrase "Second Fiduciary" for the phrase "the participant, beneficiary or other individual" as set forth therein).

(o) The authorizations described in Section II(i) may be made affirmatively, in writing, by a Second Fiduciary, in a manner that is otherwise consistent with the requirements of those sections;

(p) All of the conditions of PTE 77-4, as amended and/or restated, are met. Notwithstanding this, if PTE 77-4 is amended and/or restated, the requirements of paragraph (e) therein will be deemed to be met with respect to authorizations described in Section II(i) above, but only to the extent the requirements of Section II(i) are met. Similarly, if PTE 77-4 is amended and/or restated, the requirements of paragraph (d) therein will be deemed to be met with respect to authorizations described in Section II(i) above, if the requirements of Section II(i) are met;



(q) Standards of Impartial Conduct. If CLS is a fiduciary within the meaning of section 3(21)(A)(i) or (ii) of the Act, or section 4975(e)(3)(A) or (B) of the Code, with respect to the assets of a Client Plan involved in the transaction, CLS must comply with the following conditions with respect to the transaction: (1) CLS acts in the Best Interest (as defined below, in Section IV(o)) of the Client Plan; (2) all compensation received by CLS in connection with the transaction in relation to the total services the fiduciary provides to the Client Plan does not exceed reasonable compensation within the meaning of section 408(b)(2) of the Act; and (3) CLS's statements about recommended investments, fees, material conflicts of interest,<sup>12</sup> and any other matters relevant to a Client Plan's investment decisions are not materially misleading at the time they are made.

For purposes of this paragraph, CLS acts in the "Best Interest" of the Client Plan when CLS acts with the care,

---

<sup>12</sup> A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Client Plan. For this purpose, the failure of CLS to disclose a material conflict of interest relevant to the services it is providing to a Client Plan, or other actions it is taking in relation to a Client Plan's investment decisions, is deemed to be a misleading statement.

skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party;

(r) The purchase price paid and the sales price received by a Client Plan for shares in an Affiliated Fund purchased or sold directly is the net asset value per share (NAV), as defined below in Section IV(f), at the time of the transaction, and is the same purchase price that would have been paid, and the same sales price that would have been received, for such shares by any other shareholder of the same class of shares in such Affiliated Fund at that time; and

(s) CLS, including any officer and any director of CLS, does not purchase any shares of an Affiliated Fund from, and does not sell any shares of an Affiliated Fund to, any Client Plan which invests directly in such Affiliated Fund.

### SECTION III. General Conditions

(a) CLS maintains for a period of six (6) years the records necessary to enable the persons, described below in

Section III(b), to determine whether the conditions of this proposed exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred, if solely because of circumstances beyond the control of CLS, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than CLS shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained or are not available for examination, as required below by Section III(b).

(b)(1) Except as provided in Section III(b)(2) and notwithstanding any provisions of section 504(a)(2) of the Act, the records referred to in Section III(a) are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service, or the Securities & Exchange Commission;

(ii) Any fiduciary of a Client Plan invested in shares of an Affiliated Fund and any duly authorized employee or representative of such fiduciary; and

(iii) Any participant or beneficiary of a Client Plan invested in shares of an Affiliated Fund and any representative of such participant or beneficiary;

(2) None of the persons described in Section III(b)(1)(ii) and (iii) shall be authorized to examine trade secrets of CLS, or commercial or financial information which is privileged or confidential.

#### SECTION IV. Definitions

For purposes of this proposed exemption:

(a) The term "CLS" means CLS Investments, LLC and any affiliate thereof, as defined below, in Section IV(c).

(b) The term "Client Plan(s)" means a 401(k) plan(s), an individual retirement account(s), other tax-qualified plan(s), and other plan(s) as defined in the Act and Code, but does not include any employee benefit plan sponsored or maintained by CLS, as defined above in Section IV(a).

(c) An "affiliate" of a person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(d) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) The term "Affiliated Fund" means a diversified open-end investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act, as amended, for which CLS serves as an investment adviser.

(f) The term "net asset value per share" and the term "NAV" mean the amount for purposes of pricing all purchases and sales of shares of an Affiliated Fund, calculated by dividing the value of all securities, determined by a method as set forth in the summary prospectus for such Affiliated Fund and in the statement of additional information, and other assets belonging to such Affiliated Fund or portfolio of such Affiliated Fund, less the liabilities charged to

each such portfolio or each such Affiliated Fund, by the number of outstanding shares.

(g) The term "relative" means a relative as that term is defined in section 3(15) of the Act (or a member of the family as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(h) The term "Second Fiduciary" means the fiduciary of a Client Plan who is independent of and unrelated to CLS. For purposes of this proposed exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to CLS if:

(1) Such Second Fiduciary, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with CLS;

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary, is an officer, director, partner, or employee of CLS (or is a relative of such person); or

(3) Such Second Fiduciary, directly or indirectly, receives any compensation or other consideration for his or her personal account in connection with any transaction described in this proposed exemption.

If an officer, director, partner, or employee of CLS (or relative of such person) is a director of such Second Fiduciary, and if he or she abstains from participation in:

(i) The decision of a Client Plan to invest in and to remain invested in shares of an Affiliated Fund;

(ii) Any authorization in accordance with Section II(g), and any authorization, pursuant to negative consent, as described in Section II(i); and

(iii) The choice of such Client Plan's investment adviser, then Section IV(h)(2) above shall not apply.

(i) The term "Secondary Service(s)" means a service or services other than an investment management service, investment advisory service, and any similar service which is provided by CLS to an Affiliated Fund, including, but not limited to, custodial, accounting, administrative services, and brokerage services. CLS may also serve as a dividend disbursing agent, shareholder servicing agent, transfer agent, fund accountant, or provider of some other Secondary Service, as defined in this Section IV(i).

(j) The term "business day" means any day that:

(1) CLS is open for conducting all or substantially all of its business; and

(2) The New York Stock Exchange (or any successor exchange) is open for trading.

(k) The term "Fee Increase(s)" includes any increase by CLS in a rate of a fee previously authorized in writing by the Second Fiduciary of each affected Client Plan pursuant to Section II(g) above, and in addition includes, but is not limited to:

(1) Any fee increase that results from the addition of a service;

(2) Any increase in any fee that results from a decrease in the number of services and any increase in any fee that results from a decrease in the kind of service(s) performed by CLS for such fee over an existing rate of fee for each such service previously authorized by the Second Fiduciary, in accordance with Section II(g) above;

(3) Any increase in any fee that results from CLS changing from one of the fee methods, as described above in Section II(a)(1)-(4), to another of the fee methods, as described above in Section II(a)(1)-(4); and

(4) Any change in the amount of operating expenses of a Fund that is reimbursed or otherwise waived by CLS or



its affiliates to the extent that such change results in an increase in the total operating payable by the Fund.

(l) The term "Plan-Level Management Fee" includes any investment management fee, investment advisory fee, and any similar fee paid by a Client Plan to CLS for any investment management services, investment advisory services, and similar services provided by CLS to such Client Plan at the plan-level. The term "Plan-Level Management Fee" does not include a separate fee paid by a Client Plan to CLS for asset allocation service(s) (Asset Allocation Service(s)), as defined below in Section IV(n), provided by CLS to such Client Plan at the plan-level.

(m) The term "Affiliated Fund-Level Advisory Fee" includes any investment advisory fee and any similar fee paid by an Affiliated Fund to CLS under the terms of an investment advisory agreement adopted in accordance with section 15 of the Investment Company Act.

(n) The term "Asset Allocation Service(s)" means a service or services to a Client Plan relating to the selection of appropriate asset classes or target-date "glidepath" and the allocation or reallocation (including rebalancing) of the assets of a Client Plan among the selected asset classes. Such services do not include the

management of the underlying assets of a Client Plan, the selection of specific funds or manager, and the management of the selected Affiliated Funds.

(o) The term "Best Interest" means acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of CLS, any affiliate or other party.

EFFECTIVE DATE: If granted, this proposed exemption will be effective as of the date the notice granting the final exemption is published in the Federal Register.

#### NOTICE TO INTERESTED PERSONS

Those persons who may be interested in the publication in the FEDERAL REGISTER of the Notice include each Client Plan invested in shares of an Affiliated Fund and each plan for which CLS provides discretionary management services at the time the proposed exemption is published in the Federal Register.

It is represented that notification will be provided to each of these interested persons by first class mail, within fifteen (15) calendar days of the date of the publication of the Notice in the Federal Register. Such mailing will contain a copy of the Notice, as it appears in the Federal Register on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing.

The Department must receive all written comments and requests for a hearing no later than forty-five (45) days from the date of the publication of the Notice in the FEDERAL REGISTER.

All comments will be made available to the public.

**Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department, telephone (202) 693-8456. (This is not a toll-free number.)

#### **GENERAL INFORMATION**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent

fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all

material terms of the transaction which is the subject of  
the exemption.

Signed at Washington, DC, this 30<sup>th</sup> day of March, 2018.

---

Lyssa Hall, Director,  
Office of Exemption  
Determinations,  
Employee Benefits Security  
Administration,  
U.S. DEPARTMENT OF LABOR.

[FR Doc. 2018-06849 Filed: 4/3/2018 8:45 am; Publication Date: 4/4/2018]